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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1939.**

**No. [redacted] 12**

UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

APPALACHIAN ELECTRIC POWER COMPANY,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939

No. 674

UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

APPALACHIAN ELECTRIC POWER COMPANY,

*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner seeks a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit (XI,* 64) affirming a decree of the United States District Court for the Western District of Virginia (I,* 170-1) dismissing the petitioner's Bill of Complaint after hearing on the merits.

### Opinions Below

The opinion of the District Court (I, 78-163) is reported in 23 F. Supp. 83. The opinion of the Circuit Court of Appeals and the opinion of the dissenting judge (XI, 3, 64) are reported in 107 F. (2d) 769.

### Statement of the Case

**A. The Proceedings Leading Up to the Filing of the Instant Suit.**

On June 26, 1925, a declaration of intention to construct, operate and maintain the project involved in this suit (hereinafter sometimes called the Radford project) was filed with the Federal Power Commission under Section 23 of

* Roman numerals refer to eleven volumes filed by petitioner with this Court. Vols. I-IX are appendices to briefs in C. C. A. Vol. X is respondent's like appendix of photographs, of which petitioner filed nine copies with reddish-brown covers, containing grievously blurred, detail-effacing reproductions; for any proper appreciation of the views portrayed, the Court is respectfully referred to the original exhibits or, more conveniently, to the *single, black-cover* copy filed with this Court of Vol. X as filed in C. C. A.

the Federal Water Power Act by a predecessor of respondent for the purpose of obtaining a determination, in accordance with the plain facts, that the project was not subject to the jurisdiction of the Commission (Ex. 88, IX 531). Subsequently the declaration was assigned to, and adopted by, respondent. Pending action upon the declaration, respondent at the suggestion or request of the Commission, filed an application for a license for said project "upon the understanding that such application can be withdrawn if it should develop that a Federal license is not required." (I, 26; Exs. 568, IX 536; 102, IX 571.) Pending action upon the declaration, there was had by the Army engineers upon this application a field hearing which concededly constituted no part of any investigation under the declaration. (Ex. 101, IX 573; IX 775; 797, 806; I, 138.)

At the only public session of the Commission in connection with its investigation under the declaration (held March 2, 1926), the only evidence offered or received was the report of the Chief of Engineers that New River was not navigable and that it would *not be possible* so to operate the project as to impair the navigable capacity of navigable waters. (I, 138; Ex. 572, VIII 1.) Nevertheless on June 1, 1927, the Commission, while finding that New River "in the part thereof involved in said declaration of intention is not 'navigable waters' within the definition of said Act" (Federal Water Power Act) also purported to find "that the interests of interstate or foreign commerce would be affected by such proposed construction." (II, 1170-4.) On July 1, 1927, the Commission tendered a standard form or major license to respondent (Ex. 574-C, IX 583). Respondent declined the license but, while denying any jurisdiction in the Commission or petitioner, offered to accept all of the conditions of the tendered license regulatory of the flow through the power house or over the dam and having any relation to the alleged protection, no matter how unnecessary, of the navigable capacity of navigable waters. (Ex. 91, IX 600, 614.)

Subsequently, while still denying any jurisdiction in the Commission or petitioner, respondent on February 4, 1930, applied for a minor-part license, under section 10(i) of the Act, containing only such conditions as would have a real

and substantial relation to the protection of navigation or navigable capacity. (Ex. 529, IX 615.) The Attorney General of the United States rendered on September 22, 1930, an opinion that the Commission had power to issue such a license and that any attempt to impose any broader license would raise grave constitutional questions (Ex. 532, IX 646*). On November 6, 1930, the Secretary of the Commission forwarded to respondent a draft of a proposed minor-part license. (Ex 537, IX 664.) Respondent offered to accept such minor-part license. (Ex. 542, IX 673.)

Suddenly the Commission advised respondent that on November 25, 1930, it had determined to take no action favorable or adverse on the application for a minor-part license because, in view of the questions of jurisdiction between the United States and Virginia, a court adjudication was desirable. (Ex. 91, IX 717.) The Commission, on April 3, 1931, denied the application for a minor-part license and ordered respondent not to proceed with construction unless and until it agreed to accept a license containing numerous burdensome conditions and restrictions having no relation to the putative protection of navigation or navigable capacity of the Kanawha River. (I, 140; II, 1175.)

On May 5, 1931, the Commission tendered the respondent such a license which recited that the "maps, plans and specifications of said project" submitted by respondent had been approved by petitioner through its agents, the Chief of Engineers and the Secretary of War, from the standpoint of navigation (as further appears from the endorsement on the plans themselves, Ex. 90-A) and by its agency, the Federal Power Commission, as being "best adapted to a comprehensive scheme of improvement and utilization of said waters, for the purposes of navigation and interests of navigation, and/or interstate or foreign commerce, of water power development, and other beneficial public uses." (Ex. 131; IX 722.) The Radford project has been constructed at the location and upon the precise plans so approved. (VIII 453; IX 1008.) This second tendered license (which is the license petitioner asked the court to require respondent to accept) contained *inter alia* precisely the same conditions (for the alleged protection of navigation) with reference

* 36 Op. Atty. Gen. 355.

to the regulation of flow through respondent's power house and over its dam as those contained in the draft of minor-part license which respondent had formally offered to accept. Because of the recapture clause and other conditions irrelevant to navigation, respondent declined this major license and sought a judicial determination of the controversy (*Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451), but the court found there was no jurisdiction.

Having failed in its efforts to secure a judicial determination, respondent, under date of September 13, 1934, advised the Secretary of War that it had commenced construction without accepting a federal license, that for six years it had consistently expressed its willingness to accept a federal license with conditions limited to the protection of navigation or of navigable capacity, that the project would not cause any impairment of navigable capacity, but that the respondent would nevertheless abide by any orders of the Secretary of War regarding the construction and operation of the project and relating to the putative protection of navigation (Ex. 586, IX 740; Ex. 588, IX 746).

B. **Description and Location of Radford Project.**

The Radford project consists of a concrete dam with an overall height of 130 feet, a reservoir with a usable drawdown of 27 feet and utilizable storage capacity of 100,000 acre-feet and electric generating machinery with a maximum hydraulic capacity of approximately 9,000 c.f.s. The Radford project is located a few miles above Radford, Virginia, in the New River, a tributary of the Kanawha River. It is approximately 160 miles upstream from the head of navigation on the Kanawha River and approximately 170 miles upstream from the London Dam, the upstream Government dam on the Kanawha River. About four years ago Electro-Metallurgical Co. completed a hydroelectric development in the New River at Hawksnest, only about 13 or 14 miles above the head of navigation on the Kanawha River. The Buck and Byllesby hydroelectric plants of respondent were constructed in New River some miles above the Radford project about 1912 and have operated continuously since that time. All of

the last three named dams were constructed and have been operated without a federal license; and none contains any lock or other navigation facilities.

Petitioner has instituted condemnation proceedings to acquire lands for the construction of its Bluestone Reservoir, in the New River, a few miles above Hinton, West Virginia, and about 85 miles downstream from the Radford project. According to the plans, the Government Bluestone project will consist of a concrete dam with a height of 150 feet, a utilizable power storage of 245,000 acre-feet, electric generating machinery with a maximum hydraulic capacity of 11,000 c.f.s. and flood storage of approximately 268,000 acre-feet (I, 127-8). Like all other dams on New River, the plans for this Government Bluestone dam do not provide for any lock or other means for navigation (XI, 21).

**C. The Issues Raised by the Instant Suit and Their Disposition by the Courts Below.**

On May 6, 1935, the petitioner instituted this suit for a mandatory injunction requiring respondent to remove its dam and hydroelectric plant then under construction in the New River just above Radford, Virginia, or to accept a major or standard form license under the Federal Water Power Act of 1920 (I, 1-24). The Bill asserted two alleged causes of action, to wit:

*First:* That the construction and operation of respondent's project without a Federal license is unlawful

(a) under Section 9 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1151), because New River is navigable in fact in interstate commerce, or

(b) if New River be not so navigable, then under Section 10 of that Act, because the construction and operation of said project would substantially impair the navigable capacity of the Kanawha River, a navigable water of the United States, to which New River is tributary (I, 1-15).

*Second:* That the construction and operation of respondent's project without a standard-form or major

license under the Federal Water Power Act of 1920 is unlawful under that Act

(a) because New River is navigable in fact in interstate commerce, or

(b) if New River is not so navigable, then because the construction and operation of respondent's project will substantially impair the navigable capacity of the Kanawha River and thereby affect the interests of interstate commerce (I, 16-17, pars. 21-23).

It will thus be seen that, while two alleged causes of action were asserted upon the basis of different statutes, both alleged causes of action depend upon the same issues of fact. They were:

(a) Is New River navigable in fact in interstate commerce?

(b) If New River is not navigable in fact in interstate commerce, will the construction and operation of the Radford project substantially impair the navigable capacity of the Kanawha River?

While the answer raised other defenses, it is sufficient for present purposes to point out that both of these alleged ultimate facts were put in issue by the answer (I, 29-77). The hearing of evidence commenced on July 11, 1936 and extended continuously through September 5, 1936. More than 135 witnesses testified and more than 360 exhibits were introduced in evidence. The evidence, exclusive of voluminous exhibits, occupied over 7000 pages of transcript.*

After this exhaustive hearing, the District Court found each of these issues of fact against the petitioner. Upon the first issue of fact, the District Court found:

"The volume of the evidence introduced before the court has permitted discussion of only the most pertinent features of it and then only in general

* On December 30, 1936, the petitioner filed a printed brief of 559 pages and respondent filed separate printed briefs on fact and law totaling 254 pages. Thereafter the District Court heard three days of oral argument. Subsequently supplemental briefs totaling 444 pages were filed with the District Court. Both parties filed requests for findings of fact and conclusions of law.

terms. From a consideration of all of it, the conclusion is reached that New River is not, and never has been navigable, either in its natural condition or after the improvements made, except in certain short and isolated stretches to each of which the navigation was local and confined within the limits of a single state; and that it has never been used and has never been susceptible of use, as an avenue of interstate or foreign commerce. It is, therefore, found that defendant's project is not situated upon a navigable water of the United States." (I, 119.)

"The New River is not a navigable water of the United States, either at the site of defendant's project or elsewhere throughout its course." (I, 167.)

These ultimate findings are supported by a comprehensive review of the evidence and by a large number of detailed findings upon underlying facts (I, 93-112). The evidence reviewed in the trial court's opinion abundantly supports its findings, but by no means exhausts the evidence supporting them.

Upon the second issue of fact, the District Court found:

"I am unable to find anything in the evidence that indicates a probability that the operation of defendant's project will impair the navigable capacity of the Kanawha or any other navigable water. The only suggestion to which serious consideration could be given is the matter of the power waves heretofore discussed. If the Bluestone Dam is built as planned the possibility of harm from this source disappears. And it seems reasonably certain that a dam will be built at Bluestone—if not by the government, then by the defendant itself. But, even if no dam is ever built there, I think the evidence shows that navigation on the Kanawha will not be impaired or hampered in any way by power waves, or any other causes due to the operation of defendant's plant at Radford." (I, 129-130).

The construction of the defendant's project will not obstruct the navigable capacity of the Kanawha River or of any navigable water of the United States. And the operation of defendant's project in any normal, rational or probable method of operation will not obstruct, or impair the navigable capacity of the Kanawha or any navigable water of the United States

> and will not affect the interests of interstate commerce." (I, 167).

These ultimate findings are supported by numerous findings of underlying or evidentiary facts (I, 121-129).

While unnecessary, the District Court observed that the petitioner would not be barred if any material change in facts should occur in the future.

The Court of Appeals carefully reviewed, and independently weighed, the evidence and reached the same conclusions of fact as the District Court and thereupon affirmed the findings made by the District Court (XI, 13, 22, 26).

The States of Virginia and West Virginia appeared as *amici curiae* in both courts below and by their respective Attorneys General filed briefs in opposition to petitioner's contentions. Each State contended, among other things, that New River is not navigable and is not subject to the asserted jurisdiction of the Federal Power Commission.

Having found (a) that New River is not navigable in fact in interstate commerce and consequently not a navigable water of the United States and (b) that neither the construction nor the operation of respondent's project will substantially impair the navigable capacity of any navigable water of the United States and consequently will not affect an interest of interstate commerce, the courts below both held that neither the Rivers & Harbors Act of March 3, 1899 nor the Federal Water Power Act is applicable and *a fortiori* no cause of action had been established under either Act. Neither statute nor any part thereof was held unconstitutional, and upon the facts so found neither Act is applicable.

That the lower courts were correct in so holding upon these facts is, we think, conceded. In the Circuit Court of Appeals the petitioner expressly stated:

> "If New River is not a navigable water of the United States, and if the project in question will not diminish the navigable capacity of a navigable water of the United States, then the Act (Rivers & Harbors Act of March 3, 1899) is not applicable and, therefore, no constitutional question is involved." (Petitioner's Supplemental Brief in the Circuit Court of Appeals, p. 236.)

And further:

> "If, upon the facts, New River is not navigable water of the United States within the meaning of the Federal Power Act, and the project will not affect the interests of interstate or foreign commerce, then the Federal Power Act is not applicable and no constitutional questions need be considered." (Petitioner's Supp. Br. in Court of Appeals, pp. 236-7.)

**The Issues as to Whether Certiorari Should be Granted.**

The questions which the petitioner asserts (Pet. 2-3) are presented by its petition for certiorari are:

> "1. Whether respondent's project, a dam and hydro-electric plant constructed in New River, is in navigable waters of the United States, within the meaning of Section 9 of the Rivers and Harbors Act of 1899 and Section 3(8) of the Federal Power Act.
>
> 2. Whether respondent's project will obstruct the navigable capacity of waters of the United States within the meaning of Section 10 of the Rivers and Harbors Act of 1899, or affect the interests of interstate commerce within the meaning of Section 23 of the Federal Power Act.
>
> 3. Whether the licensing provisions of the Federal Power Act are constitutional, whether applied to a project located in navigable waters, or to a project which affects interstate commerce and is located in nonnavigable waters over which Congress has jurisdiction under the commerce clause."

As we hereinafter show, the first two questions present only issues of fact, while the third question tenders only abstract issues of law not raised by the facts and not decided by the court below.

Consequently, the respondent contends that the petition for certiorari should be denied because the petition seeks merely to invoke a review

> (a) of issues of fact upon which two lower courts have already decided adversely to petitioner upon evidence not only substantial but conclusive, and
>
> (b) of abstract legal questions which are moot upon the facts as so determined and which were not decided by the court below.

# ARGUMENT

## I

**The first "Question Presented" (Navigability) tenders only an issue of fact upon which both lower courts have upon substantial evidence found adversely to petitioner; and consequently states no ground for certiorari.**

Certiorari is not granted to review evidence and discuss specific facts. *United States* v. *Johnston*, 268 U. S. 220, 227; *Southern Power Co.* v. *Public Service Co.*, 263 U. S. 508, 509. Findings of fact concurred in by two lower courts will be accepted as unassailable in this court if supported by substantial evidence. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477; *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, 441; *Brewer-Elliot Oil and Gas Co.* v. *United States*, 260 U. S. 77.

Navigability, in the Federal sense, is a question of fact *Crowell* v. *Benson*, 285 U. S. 22, 55; and "each determination as to navigability must stand on its own facts". *United States* v. *Utah*, 283 U. S. 64, 87. In the Circuit Court of Appeals, petitioner said:

> "It cannot be said that the New River presents a 'clear case' of navigability or non-navigability * * *."
> (Petitioner's Supp. Br. in Court of Appeals, p. 268)

Manifestly, in the face of this admission, petitioner cannot be heard to say that this finding, concurred in by the Circuit Court of Appeals and the District Court, is not supported by substantial evidence—an issue as to which the burden of proof rested upon petitioner.

The evidence reviewed by both courts below conclusively shows that that concession was by no means improvident. Indeed the evidence reviewed establishes a clear case of non-navigability. (I, 88-90, 93, 95-119; XI, 11-26) But the evidence reviewed in the opinions by no means exhausts the evidence in support of the findings.

That New River was not navigable in fact in a state of nature was overwhelmingly established. In contrast with the average slope of 1.25 feet per mile on the navigable Kanawha, the average slope of New River between Wilson

Creek and its mouth is 7.1 feet per mile (I, 88). Petitioner refers to cases involving the Fox, Colorado, Grand and Green Rivers (Pet. 20). The average slope of the Fox River is less than 1.15 feet per mile (Report of Chief of Engineers 1936, pp. 1182-3). The average slopes of those parts of the Colorado, Green and Grand Rivers held navigable in *United States* v. *Utah, supra,* were only 2 feet per mile (*United States* v. *Utah, supra:* Govt. Exh. 5; Master's Report, 146).

The mile-by-mile surveys (Ex. 31, II, 614; Ex. 35, VIII, 178) of New River from Hinton to the North Carolina line, made by Army Engineers before any work had been done by the Government, graphically portray the fact that shoals, rapids, falls and boulders were so numerous, general and continuous that only an occasional pool could be found which the engineers could denominate as "good water". These surveys plainly establish that New River is not a stream where general navigability is "occasionally interrupted by falls, rapids or other obstructions to practical navigability," but instead one where ledges, boulders, rapids, falls and other unfavorable conditions are general and not merely occasional—are the rule and not the exception.

Thus, the figures in the Reports of the Chief of Engineers show that, in the three short and widely-separated intrastate reaches of New River in which Federal work (hereinafter discussed) was done in an effort to create local navigability to railheads, the engineers found that, even to provide a narrow channel (in one stretch as narrow as 10 feet) only 18 inches deep, it was necessary actually *to cut through rock ledges constituting from 34% to 44% of the entire distance* covered by these short attempted improvements (VIII, 211; VIII, 216; VIII, 206; VIII, 225). This well illustrates how numerous, general and continuous are the rocky ledges, quite apart from the innumerable shoals, boulders and other types of obstructions.

Although land travel presented tremendous difficulties and corresponding incentive to use New River, the uncontradicted evidence established a complete absence of any use of New River for trade, travel or transportation by early

settlers, traders, travelers or even military expeditions VIII, 93-107). Indeed, the evidence affirmatively established that the routes used by early settlers, traders and travelers were land routes which, so far as they led westward or northwestward, had their terminus at Kelly's Boat Yard near Charleston, West Virginia, at the head of navigation on the Kanawha River (VIII, 95-117).

Lead smelters and charcoal iron furnaces were in operation on the New River above Radford from the earliest days. Although the great advantage which would have accrued, had it been possible to use New River for the transportation of these products to the eastern and western markets, was early recognized, the uncontradicted evidence establishes that the refined lead and the charcoal iron were transported by land to both eastern and western markets, except for a very limited, temporary, experimental and unsuccessful local movement of a small quantity of charcoal iron in open boats (beginning December 1881, and abandoned probably by June 1882, or at latest 1883) over a short stretch of the river above Radford, Virginia, after the attempted Federal improvement in that stretch (VIII, 114-117, 100-101; 122-132; 323; Ex. 38, II, 677, 682).

The natural non-navigable character of the New River was not changed by the inconsequential Federal work done on three widely separated intrastate stretches (VIII, 3-5; 51-53). A little less than $110,000. was spent on this abortive scheme during the period extending from 1877 to 1889. "Work was limited to the most easily improved places" (Ex. 572, VIII, 5) and no work was attempted in the 60-mile section extending downstream from Radford, Virginia, to the Virginia-West Virginia State Line. The nature of the undertaking, the actual conditions disclosed in the course of the work, and its abandonment were strong evidence of non-navigability (I, 96-109, 119; *Oklahoma* v. *Texas*, 258 U. S. 574, 590-1).

During the period extending from December 29, 1925, to October 24, 1930, New River, including particularly the stretch in the vicinity of Glen Lyn, was the subject of official investigation and report by no less than four officers of the Corps of Engineers of the United States Army, including

two Chiefs of Engineers. In each instance *they reported that New River is not navigable in fact at any point in its course* (Ex. 539-B, VIII, 8; Ex. 579-B, VIII, 15; Ex. 579-C, VIII, 18; Ex. 572, VIII, 1).

However, the above mentioned Federal work had had two local effects which are of significance in interpreting and weighing evidence in this case. It resulted in some temporary local, intrastate use of New River by small open boats propelled by poles, for a short stretch above Hinton, West Virginia, and for a short stretch above Radford, Virginia. All reliable testimony of temporary use related to these short intrastate stretches and was referable to the artificial improvement in those local stretches.

The lower courts did not find that these short intrastate stretches (viz., one extending upstream from Radford, Virginia, and the other extending 23 to 24 miles between Hinton, West Virginia, and Round Bottom, West Virginia) were navigable in fact, but merely that such artificial navigability, if any, as was created in these short local stretches, or any part of them, was *not interstate*. Petitioner takes nothing by the repeated statement that "neither court below denied" that these intrastate stretches are navigable (Pet. 9, 22; see also 18)—an issue not involved in this case and upon which the lower courts made no finding. However, the Court of Appeals did observe that the Federal work in these intrastate stretches did not change "their original non-navigable condition" (XI, 26). The bald assertion (Pet. p. 23, footnote) that neither of the lower courts questioned the navigability of the stretch between Glen Lyn, Virginia, and Hinton, West Virginia, is in the teeth of the express finding of the District Court concurred in by the Court of Appeals (I, 167, 190; XI, 15, 22, 26, 30-31; see also pp. 6-7 supra).

But, even a finding (had any such been made) that these short intrastate stretches were navigable would have furnished no basis for a claim that the intervening 60 mile section, between Round Bottom, West Virginia, and Radford, Virginia, is navigable in fact. Plainly such use as was made of these local stretches was referable to their

artificial improvement by the federal government, whereas the intervening section was practically devoid of Federal work.* The average slope of the river between Hinton, West Virginia, and Round Bottom, West Virginia, is (as stated by petitioner below; Petitioner's Supp. Br. in Court of Appeals, p. 52) 3.7 feet per mile (Ex. 196). The slope for the first 40 miles above Round Bottom is approximately 5.5 feet per mile or about 50 per cent greater (Ex. 196). No stretch between Hinton and Round Bottom has a slope approaching the average of 15 feet per mile which obtains over the 2.7 mile stretch between Big Walker Mountain Falls and the upper end of Sifford Falls in the 60 mile middle section (Ex. 196). Apart from the other obstacles, the effect upon velocities is obvious. Testimony also shows that the physical characteristics of the middle section of New River are unique, found in no other river of appreciable size and peculiarly unfavorable to navigation (VIII, 77-90). Some of the obstacles are shown in the photographs (X).**

Similarly, no attempt was made to improve the larger part of the stretch from Round Bottom, West Virginia, to Glen Lyn, Virginia. Again, the slope from Round Bottom to Glen Lyn is approximately 50 per cent greater than the slope between Hinton, West Virginia, and Round Bottom, West Virginia (Ex. 196). Above Round Bottom in quick succession are Kings Ripple with a gradient of 10 feet to the mile, Pennington's Ledge with a fall of 30 feet to the mile, Pennington's Shoals with a fall of 13½ feet per mile for 1900 feet; Kidwell's Ripple with a fall of about 17 feet per mile, Wiley's Falls with a fall of 4 feet in a distance of 10 feet (Ex. 31, II, 620), Wiley's Shoals with a fall of 17 feet per mile for 465 feet and Shumate's (Neilley's) Falls with a fall of 11 feet, 6 of it nearly vertical (Ex. 31, II, 620).

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* The Federal work ceased after having proceeded only about 2 miles into this more precipitous intervening section (I, 99; XI, 23); none of it above the State line at Wiley's Falls was completed (VIII, 212).

** Meaning *black-cover* Vol. X of photographs as filed by respondent in C. C. A. and certified to this Court—not petitioner's grossly inadequate reproductions, with details blurred or completely lost, bound in reddish-brown.

The Corps of Engineers had specifically considered the Glen Lyn stretch and officially reported it to be non-navigable (Ex. 579-B, VIII, 15; Ex. 579-C, VIII, 18). Indeed, the *petitioner* is condemning lands for the construction of a dam 150 feet high a few miles above Hinton, West Virginia, which would be a complete barrier to navigation in this stretch were it navigable. And the conditions incorporated in the tendered license for the alleged protection of navigation relate only to the navigable Kanawha and have no application to nor even mention of the non-navigable New River (Ex. 131, IX, 732, Article 15).

The petitioner does not attempt to show that the finding of non-navigability is not supported by substantial evidence. Petitioner in effect merely asserts that there was some conflicting evidence (Pet. 18-19). Manifestly, this presents no question for review. Nevertheless, a word upon this alleged conflicting evidence may be appropriate. It is of the type which this Court has said is often vague and untrustworthy and must yield to evidence of a more definite character. (*United States* v. *Oregon*, 295 U. S. 1, 19; *Oklahoma* v. *Texas*, 258 U. S. 574, 586-7; XI, 24). This evidence, much of it hearsay, was not only at war with other types of evidence of a higher order, but was contradicted by other testimony of like character and by known facts (XI, 24-5).

The assertion (Pet. 19) that the lower courts did not dispute the accuracy of the facts summarized by the dissenting judge is manifestly untrue. In discussing this testimony the Court of Appeals said in part (XI, 24-5):

> "It is said that this conclusion did not correctly appraise the effect of the oral nonexpert testimony; and in plaintiff's reply brief there are listed the names of 23 such witnesses from whose testimony it is contended the contrary conclusion should have been reached. We have carefully considered this testimony, but are not convinced that it was given too little weight. This is the type of testimony that the trial judge who sees and hears the witnesses is particularly well qualified to appraise. These witnesses were for the most part elderly men who were testifying purely from unaided memory of events long past. Such testimony has inherent infirmities and is obvi-

> ously not entitled to the weight to be properly given to contemporary official written records (United States *v.* Oregon, 295 U. S. 19). It also had to be appraised in connection with similar testimony of almost an equal number of witnesses introduced by the defendant by which it was to a considerable extent contradicted or qualified; and proper consideration also had to be given to the other testimony in the case, verbal and documentary, of expert and scientific witnesses tending very strongly to show that the river was nonnavigable in fact."

Manifestly, that the finding of non-navigability, concurred in by both lower courts, is supported by substantial evidence is not open to question. Consequently, unless petitioner can demonstrate that the two lower courts applied an erroneous definition of navigable waters of the United States, the first question sought to be presented by the petition can furnish no basis for certiorari. To escape this difficulty, the petitioner advances two assertions. First, petitioner asserts that the courts below "have revised long-settled rules as to the test of navigable waters" (Pet. 16, 21). This contention is fully refuted by the opinions below (XI, 14-15; I, 110, 112-119). These opinions demonstrate that both courts adopted and applied the definition of navigable waters of the United States which was laid down by *The Daniel Ball*, 10 Wall. 557 and which has been consistently adhered to since that time (XI, 14-15; I, 112-115).* Petitioner cites no case which enunciates a test of navigability different from that applied by the courts below. Indeed, petitioner's argument on this point (Pet. 18-22), sought to be put forward under the color of a question of law, is in reality merely an argument that more weight should have been given certain selected items of evidence—a question of fact not open here—and this argument is advanced without

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* The statement that the Court of Appeals "indicated that an actual present navigation was necessary" (Pet. 12) and the implication that that Court disregarded "susceptibility to commercial use" (Pet. 12) are clearly negatived by the opinion (IX, 14-15). Moreover, the first of these is sought to be conjured out of a comment, as to effect upon navigation, which has no relation to the definition of navigable waters laid down and applied by the Court.

any reference to the mass of other evidence which squarely supports the finding concurred in by both lower courts.

The second assertion (Pet. 22) of the petitioner is that the courts below erred in not holding the intrastate stretch above Radford, Virginia, to be a navigable water of the United States because this alleged intrastate navigable water, upon which the negligible and unsuccessful experiment in boating charcoal-iron was made in the early 1880's (see p. 12, *supra*), connects with an interstate railroad at Radford, Virginia, over which some of such iron was subsequently shipped. This legal proposition is at war with every decision of this Court on the subject. Manifestly, *The Daniel Ball, supra,* furnishes no support for any contention that an intrastate navigable water becomes a navigable water of the United States if it is possible to transfer products to an interstate railroad. In addition, it should be observed, first, that the lower courts did not find that this stretch was an intrastate navigable water, and, second, that the uncontroverted evidence is that there is no commerce whatsoever on this stretch (or indeed any other stretch) of New River (VIII, 11).

If the reference to navigability "within the meaning of Section 9 of the Rivers and Harbors Act of 1899 and Section 3(8) of the Federal Power Act", is intended to imply that waters not navigable-in-fact in interstate commerce have been, or constitutionally could be, made navigable waters by legislative fiat, it is manifestly untenable. *United States* v. *Cress,* 243 U. S. 316, 322; *Crowell* v. *Benson,* 285 U. S. 22, 55.

From the foregoing, it is, we submit, clear that the first alleged "Question Presented" in the petition for certiorari tenders only an issue of fact, decided adversely to the petitioner by two lower courts on substantial evidence, and states no ground for certiorari.

## II.

**The second "Question Presented" (Effect of Project) tenders only an issue of fact, decided adversely to petitioner by both lower courts upon substantial evidence; and it plainly affords no ground for certiorari.**

Whether or not the construction or operation of respondent's project would substantially impair the navigable capacity of any navigable water of the United States was plainly a question of fact as to which the burden of proof rested on petitioner. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 710; *Edison Co.* v. *Labor Board*, 305 U. S. 197, 223. This issue of fact has been found adversely to petitioner by both lower courts. (See pp. 7-8, *supra.*) That finding is plainly supported by substantial evidence, and it is unassailable here. (See p. 10, *supra.*)

In the Court of Appeals, the petitioner stated with respect to this issue:

> "It cannot be said that * * * there is a 'clear case' of absence of any effect on the interests of interstate or foreign commerce." (Petitioner's Supp. Br. in Court of Appeals, p. 268.)

While the evidence *does* establish a clear case of absence of any effect upon interstate or foreign commerce, this admission manifestly precludes any contention that this finding, concurred in by both lower courts, is not supported by substantial evidence.

Indeed, petitioner cites no evidence in support of any claim that the courts below should have found that respondent's project would impair the navigable capacity of the Kanawha River. 160 miles of tortuous river, broken by innumerable shoals, falls, ledges and rapids, separate respondent's project from the head of navigation on the Kanawha River, the nearest navigable water of the United States (XI, 28; I, 90). General Taylor, then Chief of Engineers, officially reported that it would not be possible, by any physical manipulation of the project works, wholly unrelated to practical or intended operation, to affect adversely navigation on the Kanawha River (VIII, 6-7).

The practical and intended operations of respondent's dam are of the same character and order of magnitude as the actual operations of the power plants at the Government navigation dams on the Kanawha River (Ex. 145, R. 3172-3; VIII, 508-9, 493-4; Ex. 263, II, 1090-3). However, the power plants at the Government navigation dams on the Kanawha River discharge *directly* into the navigable waters, yet manifestly do not impair navigable capacity. Any contention that similar operations at Radford, Virginia, 160 miles above the head of navigation, would impair the navigable capacity of the Kanawha River, is manifestly without substance.

Great wave tests, involving discharges far larger than the maximum hydraulic capacity of respondent's project, had been made by respondent in cooperation with the Corps of Engineers of the United States Army; and it was stipulated that Colonel Ardery (United States District Engineer, whom the petitioner would not give permission to appear and testify at the request of the trial court) would testify that these tests produced no interference with navigation or navigation works in the Kanawha River (VIII, 484, 39-41; I, 125). The finding is also supported by the testimony of numerous witnesses of the highest standing and ability and the widest experience. (I, 125-6; XI, 28; VIII, 401-12, 416-9, 430, 433-4; 438-42, 497-8).

Indeed, the description of these variations in flow as "waves" is misleading. By the time the waves in the great wave tests, above referred to, reached the head of navigation, their front had an average slope of 5 inches in about 20 miles, or one-fourth of an inch per mile, and their back had an average slope of 5 inches in about 80 miles, or one-sixteenth of an inch per mile (VIII, 520-1). It would be quite as reasonable to describe as a "hill" a section of a highway which rose 5 inches in a distance of 20 miles and then fell 5 inches in 80 miles. Such slopes would not even permit drainage.

Indeed, petitioner in substance concedes that the construction and operation of respondent's project will not impair the navigable capacity of the Kanawha River (Pet. 23). The inescapable consequences of this concession are

not avoided by petitioner's three patently erroneous and untenable assertions (Pet. 23), which we now discuss.

First, without indicating any factual basis for, or application of, the contention in this case, petitioner asserts that effect upon interstate commerce, in relation to a project in non-navigable waters, embraces beneficial effect upon navigable waters elsewhere. This contention is plainly untenable as a matter of law (XI, 39; I, 143-4, 148; *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 31-32). But in any event the question is not open to petitioner or involved in this case. The petitioner in its bill charged that respondent's project would impair the navigable capacity of the Kanawha River (I, 1-17). Petitioner requested the trial court so to find (R. 125).* The petitioner reiterated this request in the Court of Appeals (Petitioner's Supp. Br. in Court of Appeals, p. 26). Having pleaded and requested both lower courts to find that the project would impair navigable capacity, petitioner cannot now assert that the lower courts erred in not finding that the project would benefit navigable capacity, and consequently no factual basis for this contention is open to petitioner.

Second, petitioner asserts that in a suit of this character for injunctive relief, the trial court should not limit its inquiry to whether the *intended* acts of the defendant will substantially impair navigable capacity, but should also inquire whether any conceivable physically possible manipulation of the project works, no matter how unrelated to defendant's intended acts or common sense, would impair navigable capacity in navigable waters elsewhere. This is plainly erroneous as a matter of law. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 710. However, the District Court also found that even the unintended and impractical manipulation of the project works assumed in

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* This reference is to Vol. I (containing *inter alia* the pleadings) of the volumes (I-XX) of the typewritten transcript as certified to this Court. This explanation is necessary because another volume of the typewritten transcript contains one set of numbers which duplicates in part the page numbers of Vol. I.

petitioner's testimony would cause no interference with navigation on the Kanawha River (I, 125).

Third, petitioner, while conceding that the lower courts correctly found as a fact that the "'power waves' * * * will be substantially dissipated before they reach the Kanawha River" (Pet. 23), apparently asserts that the lower courts erroneously took into consideration the effect of dams intermediate between the Radford project and the Kanawha River. If the lower courts had done so, that would have been correct as a matter of law.* However, the District Court held that there would be no adverse effect on navigation on the Kanawha River, regardless of intermediate dams (I, 126-130). At present there is one such intermediate dam—the Hawksnest dam of Electro-Metallurgical Company, but, when the great wave tests, involving discharges far greater than the maximum hydraulic capacity of respondent's project, were made in 1930, no dam was in existence between the site of the Radford project and the Kanawha River; and yet no effect was produced upon navigation or navigation works in the Kanawha River. (See p. 19 *supra.*) Similarly, no intermediate dam existed when General Taylor made his official report in 1925. (See p. 18 *supra.*) It is true that both courts recognized the obvious fact that, with the construction of the Bluestone Dam, it will be absurd to claim that the Radford project could have any effect upon navigation; but the finding was not based upon that circumstance.

The further contention that the respondent's project will "affect the interests of interstate commerce" because it will have a beneficial effect upon flood control is plainly without substance. The record establishes that the Federal Government has no plan for the construction of a flood control project at the site of respondent's project (Ex. 145), but, even if petitioner had such a plan, it could only execute

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* Impairment of navigable capacity is a question of fact. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690. It is to be determined upon the basis of physical conditions as they actually exist and not upon the basis of hypothetical physical conditions which do not exist. It is to be a determination of actual impairment, not of hypothetical impairment under non-existent facts.

it by condemning respondent's property and paying fair value for the property taken. However, the question is not open to the petitioner. Neither in the pleadings nor in the trial court did petitioner make any contention that the respondent's project would be beneficial to flood control. It is a power project and not a flood control project.

## III.

**The third and last "Question Presented" (Constitutionality of Power Act) tenders only abstract questions of law which were not decided by the court below. Consequently it states no ground for certiorari.**

The third question sought to be presented (Pet. 2-3) asks this court to determine the abstract legal questions whether the license provisions of the Federal Water Power Act are constitutional (a) as applied to a project located in navigable waters and (b) as applied to a project located in non-navigable waters which affects interstate commerce. The lower court did not hold unconstitutional any part of either the Rivers and Harbors Act of March 3, 1899, or the Power Act (XI, 3-44).

The petitioner concedes that the facts as found by both lower courts present no constitutional question under either Act (Pet. 16-17). The Circuit Court categorically excluded the first question from the decision (XI, 42) and, as hereinbefore pointed out, did not hold unconstitutional any provision of either Act. In an effort to circumvent this difficulty, the petitioner, by references to the court's statements of contentions of the parties and discussion of abstract legal principles found in some of the reasoning of the court (Pet. 17), seeks to conjure out of the opinion an implication or inference that the court would have held some of the license conditions unconstitutional if that question had been presented by the facts. This effort involves a misconception or misconstruction of the opinion, but in any event is irrelevant. Certiorari does not lie to review alleged errors in the reasoning of the lower court. *Hunt* v. *Western*

*Casualty Co.*, 293 U. S. 530; *Tyrrell* v. *District of Columbia*, 243 U. S. 1.

The correctness of the Circuit Court's holding that, upon the facts found by both lower courts, neither statute is applicable to respondent's project, is, we think, not fairly debatable, and was conceded by the petitioner in the court below. (See pp. 8-9 *supra*.) The factual premises upon which these concessions rest were squarely found as facts by both lower courts (see pp. 6-8 *supra*) and are supported by substantial evidence. (See pp. 10-16, 18-19, 21 *supra*.)

Quite apart from the petitioner's concession, the correctness of the holding, that the Rivers and Harbors Act is not applicable to respondent's project under the facts as found, is inescapable under its language and is squarely supported by *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690. Similarly, the correctness of the holding, that the Power Act is not applicable to respondent's project under the facts as found, is plain and squarely supported by fundamental principles long established by the decisions of this court. *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 31-32.

Since, as petitioner states, the amendments to the Federal Water Power Act are immaterial to the questions sought to be presented (Pet. 2, footnote), the lack of substance in the uncertain suggestion that the lower court may have erroneously held that the amendments should not be given retroactive effect, is manifest.

It is a settled rule of this Court that it does not render advisory opinions, *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308, 312, 314; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116; *New Jersey* v. *Sargent*, 269 U. S. 328, 333, and in particular that it will never decide a constitutional question where its decision is not absolutely necessary to the disposition of the case. *Interstate Commerce Comm.* v. *Oregon-Washington R. & N. Co.*, 288 U. S. 14; *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194. The lower court did not hold any Federal statute unconstitutional. Under the facts as found, it is plain and conceded that neither Act is applicable to respondent's project. (See pp. 8-9 *supra*.) It therefore follows that, if certiorari

were granted, this Court could not, consistently with these long-established and salutary principles, decide any important question of constitutional law or of statutory construction with reference to either the Rivers and Harbors Act of March 3, 1899, or the Power Act. Consequently, the third and last "Question Presented" affords no ground for certiorari.

## CONCLUSION.

**For the reasons hereinbefore stated, the petition should be denied.**

Respectfully submitted,

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